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No. 272

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK RIZZO, CLAIMANT OF 146,157 GALLONS OF ALCOHOL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

No opinion was rendered by the Circuit Court of Appeals, the reasons for its order being stated therein. (R. 325–326.)

JURISDICTION

The order of the Circuit Court of Appeals was entered June 4, 1935. (R. 325–326.) A petition for a writ of certiorari was filed July 23, 1935 (R. 330), and was granted October 14, 1935. (R. 330.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States has by an election of remedies, laches or waiver lost the right to have its tax lien on alcohol satisfied out of the proceeds of a judicial sale of that alcohol.

2. Whether the lower court erred in not providing for the payment of taxes out of the proceeds of a judicial sale, which it had ordered upon such terms as to restrain the United States from exercising its customary methods of collecting such taxes.

STATUTES AND RULES INVOLVED

The statutes and rules involved will be found in the Appendix, *infra*, pp. 32–39.

STATEMENT

On December 12, 1932, the oil barge *Doris* and her cargo of 146,157 gallons of grain alcohol were seized as she was lying in dock at Port Johnson, Bayonne, New Jersey, by Customs and Coast Guard officials acting jointly. (R. 102, 109, 124.) On December 22, 1932, and December 30, 1932, respectively, a libel (R. 2–4) and an amendment thereto (R. 12) were filed in admiralty in the United States District Court for the District of New Jersey against the vessel's cargo of alcohol.[1]

This libel and amendment thereto prayed a forfeiture of the alcohol on four different grounds: (1) that it was not included or described in the

[1] A libel was also filed against the barge *Doris* (R. 48–50), but the proceedings with reference to that libel are not now involved in this case.

vessel's manifest and so was subject to forfeiture under the Tariff Act of 1930, Act of June 17, 1930, c. 497, Title IV, Sec. 584, 46 Stat. 590, 748 (U. S. C., Title 19, Sec. 1584); (2) that it contained more than one-half of one percentum of alcohol and had been imported into the United States without proper permit and so was subject to forfeiture under the Tariff Act of 1930, Act of June 17, 1930, c. 497, Title I, Sec. 1, Par. 814, 46 Stat. 590, 640 (U. S. C., Supp. VII, Title 19, Sec. 1001, Par. 814); (3) that, because the vessel carrying the merchandise had become subject to a penalty for violation of the customs-revenue laws, the merchandise itself was subject to forfeiture under the supposed authority of the Tariff Act of 1930, Act of June 17, 1930, c. 497, Title IV, Sec. 594, 46 Stat. 590, 751 (U. S. C., Title 19, Sec. 1594); and (4) that, because the vessel carrying the cargo was employed in a trade other than that for which she was licensed, to wit, the transportation of intoxicating liquor in violation of the National Prohibition Act, the cargo was subject to forfeiture under R. S., Sec. 4377 (U. S. C., Title 46, Sec. 325).

To this libel, one Rizzo, as claimant, filed an answer. There was in this answer only one averment which is now of any significance. That was the claimant's allegation that "the said 146,157 gallons of alcohol were not imported into the United States of America." (R. 11. See also R. 6.)

The District Court declared the alcohol forfeited on the fourth ground set out in the libel;

that is, because the cargo was carried on a vessel employed in a trade other than that for which she was licensed. R. S., Sec. 4377. (R. 29–30.) The claimant appealed from the District Court's order, and on October 2, 1934, the Circuit Court of Appeals for the Third Circuit reversed the decree of forfeiture on the theory that after the passage of the Twenty-First Amendment to the Constitution, the penalty could no longer be imposed. (R. 289–290.) The final decree was entered the same day. (R. 290–291.) The United States filed a petition for rehearing, which was denied December 5, 1934. (R. 301.)

On November 19, 1934, while the petition for rehearing was pending, the claimant filed a petition asking the court to order a sale of the alcohol on the ground that the barge *Doris,* in which the alcohol was then contained, had been sold and immediate delivery of the barge was imperative. The petition further asked that the proceeds of sale be paid into the registry of the court to be "substituted in the place and stead of the 146,157 gallons of alcohol." (R. 291–293.) On November 22, 1934, the Circuit Court of Appeals ordered the alcohol sold, and further ordered that the proceeds of sale should be deposited in the registry of that court, and "be substituted in the place and stead of said 146,157 gallons of alcohol, and that all further proceedings shall be against said proceeds of sale." (R. 297–299.)

On December 4, 1934, that court by its order fixed the terms of sale. This order provided that the cargo of alcohol should be offered for sale "free and clear of all claims of any kind or character." (R. 299–301.) On December 8, 1934, the United States Marshal for the District of New Jersey offered the said alcohol at public auction, and the highest bid therefor was $1.85 per wine gallon. (R. 301–302.) On December 11, 1934, the lower court confirmed the sale, and ordered: (1) that the United States Marshal should deliver the alcohol to the purchaser free of all government taxes or tax liens and customs duties; (2) that "the said alcohol or spirits intended for beverage purposes shall be treated by the United States Government and any of its departments as tax paid, irrespective of the lack of any stamp or tax certificate affixed thereto on the respective containers in which said alcohol may be deposited or contained. To effectuate such purpose the said Frederick C. Schneider, United States marshal, shall affix thereto under his seal an appropriate statement to said effect"; and (3) that the proceeds of sale should be paid into its registry. (R. 302–304.)

The Government duly excepted to the making and entry of this order on the ground that it was not within the jurisdiction of the Circuit Court of Appeals. (R. 304.) A petition for a writ of certiorari, wherein was questioned the authority of the Circuit Court of Appeals to include the provisions as to taxes in its order of confirmation, was

denied by this Court on January 21, 1935. *United States* v. *Frank Rizzo, Claimant of 146,157 Gallons of Alcohol,* October Term, 1934, No. 621, 294 U. S. 709.

On January 24, 1935, there were filed in the clerk's office of the Circuit Court of Appeals certain instruments purporting to assign about $221,000 of said proceeds from the claimant Rizzo to his attorneys and another person. (R. 304–306.)

On February 2, 1935, the United States filed in the Circuit Court of Appeals a petition asking that the court direct that the proceeds of the sale be paid over to the Treasury of the United States in satisfaction of the lien for taxes due on said alcohol. (R. 307–311.) In this petition it was shown (1) that the 146,157 gallons of alcohol had been found by chemical test to be 192 proof; (2) that Section 900 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 104, as amended by the Liquor Taxing Act of 1934, c. 1, 48 Stat. 313 (U. S. C., Title 26, Sec. 1150), provided a tax of $2 per proof gallon; (3) that the tax on this alcohol was therefore $552,226.80; (4) that said tax was a lien on said alcohol until paid; (5) that no tax of any kind had ever been paid on said alcohol; and (6) that the lien in favor of the United States for taxes which existed on the alcohol had become a lien of $552,226.80 upon the proceeds. Attached to and supporting this petition was the affidavit of the Collector of Internal Revenue for the Fifth Collection District of New Jersey, certifying that

prior to the seizure of said alcohol and continuing thereafter, no tax on the same had been paid. (R. 310–311.)

Afterward, the United States Marshal consummated the sale, and deposited in the registry of the Circuit Court of Appeals $264,559.18. (Appendix to this brief, p. 40, *infra.*)

On April 22, 1935, a notice of levy for the full amount of the tax was addressed to and filed with the clerk of said Circuit Court of Appeals by the Collector of Internal Revenue for the First Collection District of New Jersey, together with warrant for distraint, two notices of tax liens under internal revenue laws, and a copy of notice and demand for tax. (R. 312–320.) On the same date, similar notices and demands were addressed to and filed with the clerk of said Circuit Court of Appeals by the Collector of Internal Revenue for the First Collection District of Pennsylvania. (R. 320–324.)

On April 25, 1935, there was filed with the clerk of said court another purported assignment by the claimant to one Charles Fisher of the sum of $31,000 of the proceeds then on deposit in the court's registry. (R. 324–325.)

On June 4, 1935, the court below entered the order now complained of, declaring in effect that since the Government had failed to raise the question of taxes when it filed its libel, but waited until the libel suit had gone to final decree and until after this Court had denied the application for writ of certiorari, it was then too late to do so; and the

court ordered that the proceeds of sale be paid over by the clerk to the claimant or his assigns. (R. 325–326.)

On June 6, 1935, a petition by the United States, addressed to the Circuit Court of Appeals for the Third Circuit, was filed, setting forth its intention to apply to this Court for a writ of certiorari (R. 326–327); whereupon the lower court ordered all further proceedings stayed pending the outcome of the petition for a writ of certiorari. (R. 327.)

This Court granted the Government's petition for writ of certiorari on October 14, 1935. (R. 330.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding in effect that the United States had waived its right to assert a claim for taxes on the alcohol by not asserting it in the original libel for forfeiture.

2. In holding in effect that the United States was chargeable with laches in not raising the question of taxes in the forfeiture proceedings.

3. In failing to order the payment of taxes due on the alcohol out of the proceeds of sale when it had been formally notified of the existence of the tax claim.

4. In ordering that the entire proceeds of sale of the alcohol be paid over to the claimant or his assigns in disregard of the Government's claim for taxes.

5. In denying the Government's petition for payment of the tax out of the proceeds of sale in the registry of the court.

SUMMARY OF ARGUMENT

The Revenue Act of February 26, 1926, c. 27, Sec. 900, 44 Stat. 9, 104, imposed upon the alcohol involved in this case an internal revenue tax of $1.10 per proof gallon. This tax was a lien upon the alcohol as soon as it was in existence. R. S., Secs. 3251, 3248. And since the tax had never been paid, the lien was still in force when the alcohol was seized. R. S., Sec. 3251. (The tax and the lien were subsequently increased to $2 per proof gallon by the Liquor Taxing Act of January 11, 1934, c. 1, Sec. 2, 48 Stat. 313; but in this case it is unnecessary to consider the increase inasmuch as the fund against which the lien is asserted is less than the original tax.)

The United States has not lost this statutory lien through election of remedies, laches or waiver. The original libel filed in the District Court was not an election to disregard the tax lien, because that original libel was founded upon alleged violations of the maritime and customs laws, and did not even collaterally involve claims for internal revenue taxes,—much less this particular tax, which was an excise on domestic production antedating the transportation which was the subject of the libel. Moreover, the United States cannot be

charged with laches, for it raised its lien claim at its earliest opportunity. This claim, being non-maritime, could not have been set forth in the libel, *Steamboat Orleans* v. *Phoebus,* 11 Pet. 175, 182, but could only be asserted by petition after a sale of the alcohol had been decreed and the proceeds therefrom had been ordered deposited in the court's registry. Admiralty Rule 42; *The Lottawanna,* 20 Wall. 201; *The J. E. Rumbell,* 148 U. S. 1, 15. Nor can it be said that the United States, by consenting to the terms on which the alcohol was sold, abandoned or waived its right to collect these taxes from the proceeds. The waiver of the United States was strictly limited to the terms of the sale, and did not include an abandonment of its rights against the proceeds. Such rights survived the sale, and, having been properly asserted, can be enforced against the proceeds of the sale. *The Lottawanna, supra; The J. E. Rumbell, supra.*

As an alternative to the *statutory* lien upon the proceeds of the sale, the United States has against these proceeds an *equitable* lien for taxes. By its order fixing the terms of sale (R. 299–301), the lower court divested the United States of two rights which it had against the alcohol on account of taxes: first, the right to require that if the alcohol were transferred by judicial sale, the purchaser should pay the taxes due, R. S., Sec. 3334, as amended (U. S. C., Title 26, Sec. 1154), and, second, the right to require that if the alcohol were

kept in unstamped containers, it should be forfeited. Act of January 11, 1934, c. 1, Title II, Sec. 206, 48 Stat. 317. Having by its judicial process restrained the United States from exercising these rights, the lower court should, upon application, have paid these taxes out of the proceeds in its registry. Cf. *In re Tyler,* 149 U. S. 164; *Union Trust Co.* v. *Great Eastern Lumber Co.,* 248 Fed. 46, 50 (C. C. A. 5th).

ARGUMENT

I

THE UNITED STATES HAS A CLAIM FOR INTERNAL REVENUE TAXES, AMOUNTING TO $552,226.80, WHICH WAS SECURED BY A STATUTORY LIEN UPON THE ALCOHOL INVOLVED IN THIS CASE.

At the time the alcohol involved in this case was seized, there was in force the Revenue Act of February 26, 1926, c. 27, Sec. 900, 44 Stat. 9, 104. This Act levied a basic [2] tax of $1.10 on each proof gallon on all distilled spirits that have been or that may be hereafter produced in or imported into the United States. Since the seized cargo of alcohol

[2] The tax to which the alcohol was subject on the date of seizure was a basic tax irrespective of the legal or illegal origin or existence of the subject-matter. *United States* v. *One Ford Coupe,* 272 U. S. 321, 328; *Various Items of Personal Property* v. *United States,* 282 U. S. 577, 579; *United States* v. *Constantine,* No. 40, October Term, 1935, decided December 9, 1935, at p. 4.

had been produced in the United States,[3] and consisted of 146,157 gallons of 192 proof, it came within the terms of the statute and was at the time of its seizure subject to a tax of $308,683.58.[4]

There is nothing in the record to indicate that this tax has ever been paid. The burden of proof to show that all the requirements of the law in relation to the payment of taxes have been complied with rested upon the claimant to this alcohol, R. S., Sec. 3333, as amended (U. S. C., Title 26, Sec. 1205), and no attempt has been made to meet this or similar burdens, as the District Judge forcibly remarked (R. 19). Indeed, what evidence there is would justify this Court in concluding, even without the benefit of the statutory presumption, that no tax had been paid. For, so far as appears, the containers of the alcohol did not bear appropriate stamps denoting the payment of the tax, Act of August 27, 1894, c. 349, Sec. 48, 28 Stat. 563 (U. S.

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[3] The claimant, both in his motion to dismiss the libel (R. 6) and in his answer (R. 11), admitted that the "146,157 gallons of alcohol were not imported into the United States of America." It is elementary that this admission in the pleadings binds the claimant. *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 302; *Pope* v. *Allis*, 115 U. S. 363, 370; *The Mount Everest*, 17 F. (2d) 478 (C. C. A. 5th, 1927). Nowhere in the record is there any evidence to the contrary, and so the inevitable inference is that the alcohol, not having been imported into the United States, was produced in the United States.

[4] This figure is arrived at by multiplying the number of gallons, 146,157, by the proof, 192/100, by the rate of tax, 1.10.

C., Title 26, Secs. 1152 (a) (2), 1197), either at the time the alcohol was seized (R. 9) or at the time the alcohol was sold subject to court order. (R. 303.)

The failure to pay the tax imposed by the Revenue Act of 1926 had one collateral consequence, which, although of no substantial significance in this particular case, should parenthetically be called to the attention of this Court. Subsequent to the seizure of the alcohol on December 12, 1932, but prior to the court's order of sale on November 22, 1934, Congress passed the Liquor Taxing Act of January 11, 1934, c. 1, Sec. 2, 48 Stat. 313 (U. S. C., Title 26, Sec. 1150. This amended the Revenue Act of 1926 so as to impose on distilled spirits that have been or that may be hereafter produced in or imported into the United States, in lieu of internal revenue taxes theretofore imposed, a tax of $2 per proof gallon. This new tax rate applies to the alcohol in this case, not only because the Liquor Taxing Act specifically covers distilled spirits that already had been produced in the United States, but also because R. S., Sec. 3254 (U. S. C., Title 26, Sec. 1150 (a) (3) provides that:

> All products of distillation, by whatever name known, which contain distilled spirits or alcohol, on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits.

As a consequence of this valid increase in the tax rate (cf. *Milliken* v. *United States*, 283 U. S.

15; *Patton* v. *Brady,* 184 U. S. 608, 623), the total tax due on the alcohol is $552,226.80. However, this increase is of no substantial significance in the instant case, because the tax due under the former rate already amounted to $308,683.58, which is in excess of $264,559.18, the amount in the registry available for distribution. See the certificate of the clerk of the Circuit Court of Appeals, appended hereto, p. 40, *infra.*

The claim at least for the taxes due under the Revenue Act of 1926 [5] was fortified by a statutory lien that attached to the alcohol as soon as it was in existence and continued until the tax was paid. R. S., Sec. 3251 (U. S. C., Title 26, Secs. 1150 (d), 1158 (e) (1)); R. S., Sec. 3248 (U. S. C., Title 26, Secs. 1150 (c), 1150 (b) (1)); *United States* v. *One Ford Coupe,* 272 U. S. 321, 328; *Thompson* v. *United States,* 142 U. S. 471, 474; *United States* v. *Ulrici,* 111 U. S. 38, 42. And that statutory lien, like some other statutory liens, was, even without assessment, distraint, or other administrative proceedings, valid against all transferees, including bona fide [6] purchasers. *Beall* v. *White,* 94 U. S.

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[5] It may very well be that the lien created by R. S., Secs. 3248, 3251 was increased when the tax itself was increased by the Liquor Taxing Act of 1934. The point, however, is, as stated in the body of the brief, immaterial in this case, and need not now be considered by this Court.

[6] Perhaps there cannot be such a person as a bona fide purchaser. For the absence of stamps on the containers of the alcohol is notice to the world that the tax has not been paid and the alcohol is subject to forfeiture. R. S., Sec. 3289 (U. S. C., Title 26, Sec. 1155 (d)).

382, 386; *United States* v. *Turner,* Fed. Cas. No. 16,548 (C. C. S. D. Ohio); *Alkan* v. *Bean,* Fed. Cas. No. 202 (C. C. E. D. Wis.).

II

THIS TAX CLAIM HAS NEVER BEEN LOST BY AN ELECTION OF REMEDIES, BY LACHES, OR BY WAIVER

The respondent in the lower court and in his brief in opposition to the petition for certiorari suggests that the Government has lost its right to enforce this tax claim because of an election of remedies, laches and waiver. And the lower court has expressly rested its decision on the ground that the Government is barred by laches. It is submitted that none of these defenses to the claim for taxes is valid.

A. THE UNITED STATES IS NOT BARRED BY AN ELECTION OF REMEDIES

The respondent contends that the United States is now estopped to assert a claim for internal revenue taxes on account of these 146,157 gallons of alcohol, because the United States in its original libel elected to seek a forfeiture of said alcohol. But this contention of estoppel by election is unsound. The doctrine of estoppel by election, as stated by this Court in *Bierce* v. *Hutchins,* 205 U. S. 340, 346,

> is simply what its name imports, a choice, shown by an overt act, between two *in-*

consistent rights, either of which may be asserted by the will of the chooser alone.

There is nothing inconsistent between an assertion by the United States of a right to forfeit alcohol because it was transported in a vessel violating navigation and customs laws, and an assertion by the United States of a right to impose an excise tax lien on the alcohol because before it was so transported it had been produced in the United States.

The difference between the transactions upon which the Government's former cause of action was based, and the transactions upon which the Government's present cause of action is founded (and the consistency of the rights asserted by the Government) is shown by a careful analysis of the libel filed in the District Court, and a comparison of it with the Government's petition filed in the Circuit Court of Appeals.

The libel and amendment thereto (R. 2–4, 12) prayed a forfeiture of the alcohol on four different grounds: (1) that it was not included or described in the vessel's manifest and so was subject to forfeiture under the Tariff Act of 1930, Act of June 17, 1930, c. 497, Title IV, Sec. 584, 46 Stat. 590, 748 (U. S. C., Title 19, Sec. 1584); (2) that it contained more than one-half of one per centum of alcohol and had been imported into the United States without proper permit and so was subject to forfeiture under the Tariff Act of 1930, Act of June 17, 1930, c. 497, Title I, Sec. 1, Par. 814, 46 Stat. 590, 640

(U. S. C. Sup. VII, Title 19, Sec. 1001, Par. 814); (3) that, because the vessel carrying the merchandise had become subject to a penalty for violation of the customs-revenue laws, the merchandise itself was subject to forfeiture under the supposed authority of the Tariff Act of 1930, Act of June 17, 1930, c. 497, Title IV, Sec. 594, 46 Stat. 590, 751 (U. S. C., Title 19, Sec. 1594); and (4) that, because the vessel carrying the cargo was employed in a trade other than that for which she was licensed, to wit, the transportation of intoxicating liquor in violation of the National Prohibition Act, the cargo was subject to forfeiture under R. S., Sec. 4377 (U. S. C., Title 46, Sec. 325).

It is obvious that all of these grounds of forfeiture are based on alleged violations of the navigation and customs laws. They are not based even indirectly[7] on the internal revenue laws. The Government made no reference in its libel and introduced no evidence in the District Court with respect to the excise taxes due upon the domestic production of alcohol.

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[7] The Government did not seek forfeiture of the cargo on a ground that even collaterally involved the internal-revenue laws, as, for example, because the vessel carrying the cargo was employed in a trade other than that for which she was licensed, to wit, the transportation of contraband or smuggled distilled spirits on which the tax had not been paid. Cf. *United States* v. *Wischerth*, 68 F. (2d) 161 (C. C. A. 2d); *United States* v. *Corriveau*, 286 U. S. 530; *United States* v. *The Ruth Mildred*, 286 U. S. 67.

The petition presented to the Circuit Court of Appeals (R. 307–311), on the other hand, has no relation whatsoever to navigation or customs matters. It states a claim based upon internal revenue taxes. These taxes are excises due on account of production of the alcohol before it was ever transported in the DORIS. They are founded on a right separate and distinct from, and yet entirely consistent with, the rights hitherto asserted in the libel. Cf. *United States* v. *One Ford Coupe,* 272 U. S. 321, 326–327.

Under these circumstances, the doctrine of election of remedies is inapplicable and the United States is not barred by its libel or the proceedings consequent upon it [8] from now asserting this claim for internal revenue taxes. *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 491; *Bierce* v. *Hutchins,* 205 U. S. 340, 346.

B. THE UNITED STATES IS NOT BARRED BY LACHES

The respondent has argued that the claim of the United States is in any event barred by laches, and

[8] The decree on the libel entered by the District Court, which was subsequently reversed and ordered to be dismissed by the Circuit Court of Appeals, provided for forfeiture based upon the fourth ground in the libel, that is, that the alcohol was subject to forfeiture because it had been carried on a vessel employed in a trade other than that for which she was licensed, to wit, the transportation of intoxicating liquor in violation of the National Prohibition Act. Neither the District Court nor the Circuit Court of Appeals has entered any decree, even of dismissal, with respect to the other three grounds for which forfeiture was prayed.

this argument was accepted in the lower court as a valid defense. (R. 325–326.) But it is submitted that the conclusion of the lower court is unsound.

A claim based on internal revenue taxes, especially on account of distilled spirits produced in the United States[9] is clearly a non-maritime claim. *The Bradich Johnson,* Fed. Cas. No. 1770 (S. D. Ala.), reversed on other grounds, Fed. Cas. No. 798 (C. C. S. D. Ala.). As such, it could not have been set forth, even when joined with a strictly maritime claim, in a libel in the admiralty. *Steamboat Orleans* v. *Phoebus,* 11 Pet. 175, 182; *Bruce* v. *Murray,* 123 Fed. 366 (C. C. A. 9th); *The Guiding Star,* 1 Fed. 347 (D. Ky.); *Pratt* v. *Thomas,* Fed. Cas. No. 11,377 (D. Maine). This being so, the United States pursued the only proper course in excluding from its libel its non-maritime lien for taxes.

Even if, as a matter of admiralty law, the Government had been free to set forth in its libel a claim based upon an internal revenue tax, it was altogether justified in not doing so in this case, and, therefore, no laches can equitably be attributed to it. At the outset of the case, the Government proctor could foresee only three different situations: first, a forfeiture of the cargo, as prayed; second, a return of the cargo to the claimant; and, third, an interlocutory sale with appropriate disposition of the proceeds. In each situation, he was war-

[9] For proof that the distilled spirits were produced in the United States, see footnote 3, p. 12, *supra.*

ranted in assuming that the lien for taxes would be thoroughly protected. If a forfeiture of the cargo were decreed, the Government would get the entire cargo of alcohol or its proceeds. If, on the other hand, the libel were dismissed and the cargo returned to the claimant, the Government would still have its statutory lien for internal revenue taxes valid against the claimant and all his successors in title. R. S., Sec. 3251; *supra,* pp. 14–15. Finally, if, by any chance, the court, before making a final disposition of the libel, ordered an interlocutory sale of the cargo, the proctor had every reason to suppose that the court would follow the express words of R. S., Sec. 3334, as amended by Act of March 1, 1879, c. 125, Sec. 5, 20 Stat. 340 (U. S. C., Title 26, Sec. 1154) and sell the alcohol subject to taxes.

Moreover, if the doctrine of laches would otherwise be a bar, it should not be applied to the Government when acting in its sovereign capacity to collect revenue. Cf. *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123; *United States* v. *Michigan,* 190 U. S. 379; *San Pedro &c. Co.* v. *United States,* 146 U. S. 120, 135.

C. THE UNITED STATES IS NOT BARRED BY WAIVER

In the lower court and in his brief in opposition to the petition for certiorari, the respondent contended that the United States had entered into an agreement whereby it waived its claim for taxes due on account of the alcohol.

The agreement to which the respondent refers is set forth in a recital in the order of the Circuit Court of Appeals of December 4, 1934, fixing the terms under which the marshal was to sell the alcohol. (R. 299–300.) This recital reads as follows:

> * * * the court having heard the argument of counsel and directed an agreement as to such terms, and the annexed terms of sale having been presented in open court as representing *the terms of sale agreed upon;*
>
> It is on this 4th day of December A. D.. 1934, ordered, adjudged, and decreed * * *. (Italics added.)

Before discussing this particular order and the recital therein, it will be helpful to review the pleadings of the parties and the orders of the lower court immediately prior thereto. This review will put the order of December 4, 1934, in its proper setting and will better enable us to understand it.

The first important step leading up to the order of December 4, 1934, was taken by the claimant on November 19, 1934. On that day he filed a petition (R. 291–295) representing that because the barge *Doris,* which contained the alcohol, had been sold, it was imperative to remove the alcohol from the barge and sell it. The petition concluded with a prayer (R. 293) for an order, pursuant to Admiralty Rule 11, directing that the alcohol be sold and—

> the proceeds of sale * * * be deposited and held in the registry of this court and substituted in the place and stead of the 146,157 gallons of alcohol * * * and that all further proceedings herein shall be against said proceeds of sale deposited in the registry of this court * * *

The Government filed an answer objecting to this petition on the ground that the Circuit Court of Appeals had no jurisdiction to order any interlocutory sale. (R. 296–297.) The Government did not at the same time mention the question of internal revenue taxes, presumably because it assumed that if the petition were granted and a sale were ordered, the court, as a matter of course, would provide either that the alcohol would be sold subject to taxes as provided by R. S., Sec. 3334, as amended by Act of March 1, 1879, c. 125, Sec. 5, 20 Stat. 340 (U. S. C., Title 26, Sec. 1154), or that the proceeds when received would be subject to taxes.

And apparently the Government's second assumption proved to be sound, for when the court on November 22, 1934, ordered (R. 297–298) the sale, it expressly—

> ordered, adjudged, and decreed, that said proceeds of sale so deposited in the registry of this court, shall *be substituted in the place and stead of said 146,157 gallons of alcohol,* and that all further proceedings herein shall be against said proceeds of sale. (Italics added.)

This must have meant that the proceeds would be subject to whatever liens existed with respect to the alcohol. For the decree is in the common form authorized by Admiralty Rule 40, which has been universally interpreted as transferring from the original *res* to the proceeds any liens which exist. *The Lottawanna,* 20 Wall. 201, 211, 221; *Schuchardt* v. *Babbidge,* 19 How. 239, 241; *Clifford* v. *Merritt-Chapman & Scott Corp.,* 57 F.(2d) 1021 (C. C. A. 5th).

Moreover, this interpretation is the only one possible in this case. For at the time the Circuit Court of Appeals issued this order of November 22, 1934, it had already reversed, with a direction to dismiss, the District Court's decree of forfeiture (R. 290, 291). ([redacted]) Thus the only further proceedings left were proceedings to enforce liens.

Having read the court's order of November 22, 1934, as preserving all liens against the proceeds, the United States Attorney felt that he was on safe ground so far as taxes were concerned. With this justifiable optimism, he reached the crucial agreement as to "the terms of sale." This is the agreement which is recited in the order of December 4, 1934, and the only evidence upon which the respondent bases his contention that the Government has waived all its rights to taxes. But it is submitted that the order cannot properly be so construed.

It will be recalled that the order (R. 300) recites that:

> * * * the court having heard the argument of counsel and directed an agreement as to such terms, and the annexed terms of sale having been presented in open court as representing *the terms of sale agreed upon;*
>
> It is on this 4th day of December A. D. 1934, ordered, adjudged, and decreed * * *. (Italics added.)

It seems too clear for controversy that this agreement was merely as to "the terms of sale." There was no agreement as to the proceeds of the sale, or as to internal revenue taxes generally.

And this strict, narrow interpretation of the agreement recited in this order was, at least until recently, shared by one of claimant's counsel. For, when the United States at the last term of Court filed a petition for certiorari to review the order of the Circuit Court of Appeals confirming the sale of the alcohol (October Term, 1934, No. 621), one of this respondent's former counsel, and one who had actually been present when the order was entered (R. 299) stated (brief, pp. 12–13) in his Brief in Opposition filed on behalf of Reo Distillers, Inc., the purchasers at the sale, that—

> In view of these pleadings and in view of the government's consent to a sale free of liens and charges, the purchaser had the right to expect that if libellant were entitled to any claim by reason of taxes or otherwise, such claim would be asserted against the

> funds in the Registry of the Court. Further, the United States Circuit Court of Appeals in confirming the sale, merely carried out the provisions of the conditions and terms agreed upon between libellant and claimant, and that Court, as well as the purchaser, had a right to assume that any claim of the libellant, if one was existent, would be exerted against the purchase price realized on the sale of the subject matter, which purchase price was by decree and agreement between the parties substituted for the res.
>
> Under the cases we have cited the government cannot now invalidate the proceedings or set aside the purchaser's title to these goods. *Its claim, if any, must be enforced against the proceeds of sale.*

Furthermore, it is significant that the Circuit Court of Appeals, before which all these proceedings occurred, and which would have been cognizant of any waiver if it had occurred, has not found any waiver such as is claimed. Its final order denying the Government's petition for taxes rests squarely on laches, and does not advert to waiver. (R. 325–326.) The refusal of the Circuit Court of Appeals to construe the recitals in its own earlier order of December 4, 1934, as embodying a waiver by the Government of its tax claim has peculiar significance. For it accords with the recognized principle that statements or acts of the Government or its agents will be narrowly construed to avoid imputing a waiver or an estoppel to the United States. *Utah* v. *United States,* 284 U. S. 534, 545; *Sani-*

tary District of Chicago v. *United States,* 266 U. S. 405, 427.

Finally, we contend that even if the United States Attorney in this case did purport to waive the rights of the United States to be paid its internal revenue taxes out of the proceeds of this sale, "he was obviously without authority to dispose of the rights of the United States * * * and could not estop it from asserting rights which he could not surrender." *Utah* v. *United States,* 284 U. S. 534, 545–546; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408, 409; *Alkan* v. *Bean,* Fed. Cas. No. 202 (C. C. E. D. Wis.).

III

THE STATUTORY LIEN, WHICH FORMERLY WAS UPON THE ALCOHOL, NOW IS UPON THE PROCEEDS OF THE ALCOHOL; AND THIS LIEN, HAVING BEEN PROPERLY ASSERTED AND PROVED, SHOULD NOW BE SATISFIED, PRO TANTO, FROM THESE PROCEEDS

As pointed out at pp. 22–23 *supra,* the Circuit Court of Appeals, in ordering the sale of the alcohol, provided, in harmony with Admiralty Rule 40, that the proceeds of the sale should be "substituted in the place and stead of said 146,157 gallons of alcohol." (R. 297–298.) This order transferred the liens which were upon the alcohol to the proceeds. *The Lottawanna,* 20 Wall. 201; *The Siren,* 7 Wall. 152, 159; *Schuchardt* v. *Babbidge,* 19 How. 239; Benedict, *Admiralty* (5th ed.) Sec. 453.

One of the liens so transferred was the valid lien of the United States for internal revenue taxes, which, as already contended, had not been lost by an election of remedies, laches or waiver. This lien,

though not a maritime lien, could, consistently with the admiralty practice, be asserted against the proceeds in the registry, *The J. E. Rumbell,* 148 U. S. 1, 15; *The Lottawanna, supra*; Benedict, *Admiralty* (5th ed.) Secs. 453, 14. And it was so asserted against the proceeds by petition in the manner authorized by Admiralty Rule 42. *The J. E. Rumbell, supra; The Lottawanna, supra; Schuchardt* v. *Babbidge, supra; The Two Marys,* 12 Fed. 152 (S. D. N: Y.).

This petition was supported by an affidavit of the Collector of Internal Revenue for the Fifth Collection District of New Jersey reciting that the taxes on this alcohol had not been paid (R. 310–311). Subsequently notices of levy, with similar recitals, were executed and filed with the clerk of the lower court by the Collectors of Internal Revenue of the First Collection District of New Jersey (R. 312–320) and of the First Collection District of Pennsylvania (R. 320–325). Each of these statements from a tax collector "amounts to an official certificate concerning a public matter presumably within his official knowledge, and * * * ought to be accepted as sufficient evidence of the fact, at least in the absence of special challenge." *Ex parte State of New York, No. 2,* 256 U. S. 503, 509.

No such special challenge has been made. The petition for taxes stands unanswered by any pleading of the respondent, other than his apparently oral motion to dismiss. On the basis of this petition and a record leaving no doubt that taxes of

$552,226.80 are due and unpaid (R. 9, 303), see also pp. 12–13, *supra,* this Court, we submit, should reverse the order of the lower court and direct that an order be entered by that court providing that the proceeds of the sale of alcohol now in its registry [10] be paid over in satisfaction *pro tanto* of the internal revenue taxes owing to the United States on account of said alcohol.

Such summary proceedings in admiralty causes are provided for by Admiralty Rule 42, and a mandate of the sort we urge is consistent with the mandates of this Court in *United States* v. *Fossat,* 20 How. 413, 427; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Hoyt,* 149 U. S. 1, 5.

IV

THE PROCEEDS ARE SUBJECT NOT ONLY TO A VALID *STATUTORY* LIEN, BUT ALSO TO AN *EQUITABLE* LIEN FOR TAXES AMOUNTING TO $552,226.80, INASMUCH AS THE LOWER COURT, BY ITS INTERLOCUTORY ORDER OF SALE, DEPRIVED THE UNITED STATES OF ITS USUAL REMEDIES AGAINST THE ALCOHOL FOR THE COLLECTION OF THESE TAXES.

As an alternative to the *statutory* lien upon the proceeds in the registry of the lower court, we contend that there is an *equitable* lien of $552,226.80 for internal revenue taxes.

Prior to the lower court's orders directing (R. 297), fixing the terms of (R. 299), and confirming (R. 302) the sale, the Government had two methods, in addition to the statutory lien method

[10] The proceeds of the sale, of course, remained in the Circuit Court of Appeals and did not follow the cause into this Court. *The Lottawanna, supra,* at p. 225.

already described, by which it might have collected the internal revenue taxes due on account of this alcohol. First, the Government had a right to forfeit the alcohol, even after it had been transferred to a bona fide purchaser, so long as it continued to be stored in a container not stamped in accordance with the internal revenue laws and regulations. Act of January 11, 1934, c. 1, Title II, Sec. 206, 48 Stat. 317 (U. S. C., Title 26, Sec. 1152 (f)). And, second, the Government had a right to collect the internal revenue taxes imposed by law from whoever purchased distilled spirits sold by order of court. R. S., Sec. 3334, as amended by Act of March 1, 1879, c. 125, 20 Stat. 340 (U. S. C., Title 26, Sec. 1154).

By the procedure it adopted in selling the alcohol, the lower court deprived the Government of these two remedies. And this deprivation resulted in making bidders at the sale offer more, thus ultimately swelling the amount realized from the sale and now deposited in the registry. For, of course, a prospective purchaser was willing to bid more for the alcohol when he was told by the lower court (R. 303) that—

> the said alcohol or spirits intended for beverage purposes shall be treated by the United States Government and any of its departments as tax paid, irrespective of the lack of any stamp or tax certificate affixed thereto on the respective containers in which said alcohol may be deposited or contained.

Since this order was in substance the same as an injunction forbidding the Government to collect taxes after the sale, the Government is entitled to receive from the proceeds *in custodia legis* the amount of taxes which, except for the restraint of the court below, could have been collected. This accords with the common practice in equity receiverships. *Marshall* v. *New York,* 254 U. S. 380, 385; *In re Tyler,* 149 U. S. 164; *Colonna's Shipyard* v. *Rowe,* 14 F. (2d) 267 (C. C. A. 4th); *First National Bank* v. *Ewing,* 103 Fed. 168, 188–189 (C. C. A. 5th); *Union Trust Co.* v. *Great Eastern Lumber Co.,* 248 Fed. 46, 50 (C. C. A. 5th). The principle, justifying this procedure, was clearly stated in the last cited case, in which, at p. 50, it was said to be—

> the recognized duty of the court, which had displaced the usual remedies for the collection of taxes by the receivership, to provide for the payment of taxes out of the proceeds of the sale, and not to remit the tax authorities to a belated use of their remedies against the property after it had passed out of the court's possession into that of the purchaser, * * *.

This principle has clear application in this cause, even though it arises in an admiralty court. The rights of which the Government was deprived by the court's order of sale were not merely *in personam* against this claimant Rizzo. They were rights attached to the alcohol itself in such a way as to affect any person who bought the alcohol at a judicial sale conducted in the manner provided

by statute, or any person who at any time had possession of the alcohol in unstamped containers. Vested rights of this sort are similar to other rights recognized by admiralty courts in the distribution of proceeds. Cf. *The Lottawanna,* 21 Wall. 558, 582; *The Duchess,* 201 Fed. 783 (E. D. N. Y.); *The Advance,* 63 Fed. 704 (S. D. N. Y.); *Town* v. *The American Banner,* Fed. Cas. No. 14,112a (S. D. N. Y.); Benedict, *Admiralty,* (5th ed.) Sec. 453. And such rights are, under Admiralty Rule 42, enforceable upon petition by summary proceedings as pointed out at p. 28, *supra.*

CONCLUSION

For the reasons advanced, it is submitted that the order of the court below should be reversed, and a decree entered ordering that court to pay over to the United States the proceeds of the sale of the 146,157 gallons of alcohol in satisfaction *pro tanto* of the internal revenue taxes owing to the United States on account of said alcohol.

Respectfully submitted,

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Special Assistant to the Attorney General.

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Attorneys.

DECEMBER 1935.

APPENDIX

The Revenue Act of February 26, 1926, c. 27, Section 900, 44 Stat. 9, 104, provides:

Subdivision (a) of section 600 of the Revenue Act of 1918, as amended, is amended to read as follows:

"SEC. 600. (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:

* * * * *

"(3) On and after January 1, 1928, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

"(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be

paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

* * * * *

The Act of January 11, 1934, c. 1, Section 2, 48 Stat. 313, amending the Revenue Act of 1926, provides in paragraphs 3 and 4 as follows:

(3) On or after January 1, 1928, and until the effective date of Title I of the Liquor Taxing Act of 1934, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon; and

(4) On and after the effective date of Title I of the Liquor Taxing Act of 1934, $2.00 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

Revised Statutes, Sec. 3254 (U. S. C., Title 26, Sec. 1150 (a) (3)) provides:

All products of distillation, by whatever name known, which contain distilled spirits or alcohol, on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits.

Revised Statutes, Sec. 3333 as amended (U. S. C., Title 26, Sec. 1205) provides:

Whenever seizure is made of any distilled spirits found elsewhere than in a distillery or distillery warehouse, or other warehouse for distilled spirits authorized by law, or than in the store or place of business of a rectifier, or of a wholesale liquor dealer, or

than in transit from any one of said places; or of any distilled spirits found in any one of the places aforesaid, or in transit therefrom, which have not been received into or sent out therefrom in conformity to law, or in regard to which any of the entries required by law to be made in the books of the owner of such spirits, or of the storekeeper-gauger, wholesale dealer, or rectifier, have not been made at the time or in the manner required, or in respect to which the owner or person having possession, control, or charge of said spirits has omitted to do any act required to be done, or has done or committed any act prohibited in regard to said spirits; the burden of proof shall be upon the claimant of said spirits to show that no fraud has been committed, and that all the requirements of the law in relation to the payment of the tax have been complied with.

The Act of August 27, 1894, c. 349, Sec. 48, 28 Stat. 563 (U. S. C., Title 26, Secs. 1152 (a) (2), 1197) provides:

That on and after the passage of this Act there shall be levied and collected on all distilled spirits in bond at that time, or that have been or that may be then or thereafter produced in the United States, on which the tax is not paid before that day, a tax of one dollar and ten cents on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon: *Provided,* That in computing the tax on any package of spirits all fractional parts of a gallon, less than one tenth, shall be excluded.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe and furnish suit-

able stamps denoting the payment of the internal-revenue tax imposed by this section; and until such stamps are prepared and furnished, the stamps now used to denote the payment of the internal-revenue tax on distilled spirits shall be affixed to all packages containing distilled spirits on which the tax imposed by this section is paid; and the Commissioner of Internal Revenue shall, by assessment or otherwise, cause to be collected the tax on any fractional gallon contained in each of such packages as ascertained by the original gauge, or regauge when made, before or at the time of removal of such packages from warehouse or other place of storage; and all provisions of existing laws relating to stamps denoting the payment of internal-revenue tax on distilled spirits, so far as applicable, are hereby extended to the stamps provided for in this section.

That the tax herein imposed shall be paid by the distiller of the spirits, on or before their removal from the distillery or place of storage, except in case the removal therefrom without payment of tax is authorized by law; and (upon spirits lawfully deposited in any distillery warehouse, or other bonded warehouse, established under internal-revenue laws) within eight years from the date of the original entry for deposit in any distillery warehouse, or from the date of original guage of fruit brandy deposited in special-bonded warehouse, except in case of withdrawal therefrom without payment of tax as authorized by law.

Revised Statutes, Sec. 3251, provides in part:

Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally

liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the lot or tract of land whereon the said distillery is situated, and on any building thereon from the time said spirits are in existence as such until the said tax is paid.

Revised Statutes, Sec. 3248, provides:

Distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.

Revised Statutes, Sec. 3289, provides:

All distilled spirits [illegible]d in any cask or package containing five gallons or more, without having thereon each mark and stamp required therefor by law, shall be forfeited to the United States.

Revised Statutes, Sec. 3334 as amended (U. S. C., Title 26, Sec. 1154) provides:

Except as provided in section 1324, all distilled spirits forfeited to the United States, sold by order of court, or under process of distraint, shall be sold subject to tax; and the purchaser shall immediately, and be-

fore he takes possession of said spirits, pay the tax thereon. If any tax-paid stamps are affixed to any cask or package so condemned, such stamps shall be obliterated and destroyed by the collector or marshal after forfeiture, and before such sale: *Provided*, That in all cases wherein it shall appear that any distilled spirits offered for sale on distraint for taxes, where the taxes on such spirits have not been paid, or offered for sale for the benefit of the United States as forfeited spirits under order of court or under proceeding pursuant to section 1624, will not, by reason of such spirits being below proof, bring a price equal to the tax due and payable thereon, but will bring a price equal to, or greater than, the tax on said spirits, computed only upon the proof gallons contained in the packages, without regard to the greater number of wine gallons contained therein, then, and in such case, upon sale being so made, tax-paid stamps to the amount required to stamp such spirits as if the tax thereon were only on the proof gallons thereof, may, under such rules and regulations as the Commissioner shall prescribe, be used by the collector making such sale, or furnished by a collector to a United States marshal, or to any other Government officer making such sale for the benefit of the United States, without making payment for said stamps so used or delivered. Any collector using or furnishing stamps in manner aforesaid, on presenting vouchers satisfactory to the Commissioner, shall be allowed credit for the same in settling his stamp account with the department. In such cases, the officer selling the distilled spirits shall affix, or cause to be affixed, to the same the tax-paid stamps so provided,

and shall write across the face of such stamps the true number of proof and wine gallons contained in the package, the amount of tax actualy paid thereon, and also the words "Affixed under provisions of act of March 1, 1879."

The Act of January 11, 1934, c. 1, Title II, Sec. 206, 48 Stat. 317 (U. S. C., Title 26, Sec. 1152f), provides:

> All distilled spirits found in any container required to bear a stamp by this title, which container is not stamped in compliance with this title and regulations issued thereunder, shall be forfeited to the United States. Distilled spirits placed in such containers prior to the effective date of this title shall not be subject to this section until the expiration of 10 days after the effective date of this title, nor (when it is established that application for stamps therefor was made within the proper time) until such stamps are received by the applicant.

Admiralty Rule No. 11 provides:

> In all cases where any goods or other things are arrested, if the expense of keeping the same is excessive or disproportionate, or if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, on the application of either party, order the same or any portion thereof to be sold; and the proceeds, or so much thereof as shall be full security to satisfy any decree, to be brought into court to abide the event of the suit; or the court may, on the application of the claimant, order a delivery thereof to him, either on the filing of a written agreement of the parties or their

proctors of record to that effect, or on a due appraisement, to be had under its direction, unless the value has been agreed to in writing by the parties or their proctors of record, on the claimant's depositing in court so much money as the court shall order, or on his giving a stipulation, with sufficient sureties or an approved corporate surety, in such sum as the court shall direct or as shall be agreed upon in writing by the parties or their proctors of record, conditioned to abide by and pay the money awarded by the final decree rendered by the court, or any appellate court, if any appeal intervenes, not to exceed however in any event such agreed or appraised value with interest at six per cent. per annum and costs, as the one or the other course shall be ordered by the court.

Admiralty Rule No. 40 provides:

All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

Admiralty Rule No. 42 provides:

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to intervene *pro interesse suo* for delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or on a hearing, be

dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

CERTIFIED STATEMENT OF CLERK OF CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT, AS TO DEPOSIT ON MARCH 12, 1935, OF THE PROCEEDS OF SALE

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit } Sct.

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, DO HEREBY CERTIFY that on March 12, 1935 I received from the United States Marshal for the District of New Jersey the sum of $264,559.18, being proceeds resulting from the sale of alcohol made pursuant to the order of this Court of November 22, 1934 in the case of Frank Rizzo, Claimant of 146,157 gallons of alcohol, appellant, vs. United States of America, libellant-appellee, No. 5247; which sum was by me on March 13, 1935, deposited in the Registry of this Court, where it at present is and remains.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 26th day of November, in the year of our Lord one thousand nine hundred and thirty-five and of the Independence of the United States the one hundred and sixtieth.

[SEAL] WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1935